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Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

STANLEY E. REED,

Petitioner,

v.

CHEVRON PIPE LINE COMPANY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. DID THE COURT OF APPEALS VIOLATE THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY REVERSING THE JUDGMENT ENTERED IN THE DISTRICT COURT UPON A JURY VERDICT FINDING LIABILITY ON THE BASIS THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT WHERE THE DISTRICT COURT HAD REJECTED RESPONDENT'S MOTIONS FOR JUDGMENT AS A MATTER OF LAW AND SUPREME COURT PRECEDENT ESTABLISHES THAT THE SEVENTH AMENDMENT'S REEXAMINATION CLAUSE PRECLUDES AN APPELLATE COURT FROM REVERSING A JUDGMENT ON THE BASIS THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT UNDERLYING THE JUDGMENT?

2. ASSUMING REVIEW FOR SUFFICIENCY OF THE EVIDENCE IS CONSTITUTIONAL, DID THE COURT OF APPEALS APPLY AN IMPROPER STANDARD IN DETERMINING THE SUFFICIENCY OF THE EVIDENCE IN THIS CASE WHEN THE COURT OF APPEALS SHOULD ONLY HAVE REVIEWED THE DISTRICT COURT'S DENIAL OF THE POST-VERDICT MOTIONS FOR ABUSE OF DISCRETION?

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LIST OF PARTIES

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CITATIONS AND REPORTS OF OPINIONS AND ORDERS

Chevron Pipeline Company v. Stanley E. Reed (No. 95-50409 Summary Calendar) Opinion dated April 8, 1996 (5th Cir.) unpublished opinion. Petition for Rehearing denied May 14, 1996. (See Appendix A & B)

STATEMENT OF THE BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). The opinion of the Fifth Circuit Court of Appeals to be reviewed was dated April 8, 1996 and the Petitioner's Motion for Rehearing was denied by the Fifth Circuit Court of Appeals on May 14, 1996.

THE CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment of the United States Constitution states as follows:

"In suits at common law, where the value and controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

At issue in this case is the second clause of the Seventh Amendment, which forbids a federal court from "reexamining" any fact tried by a jury except other than according to the common law. The Court of Appeals Judgment in this case certainly "reexamined" a fact tried by a jury because the sole basis for its decision to reverse the judgment entered in the District Court was that the evidence was insufficient to support the jury's verdict and the judgment

entered thereon. No question of law formed the basis of the Court of Appeal's decision; nothing in that decision indicates that the jury was not correctly charged on the law applicable to the Petitioner's claim and the evidence in the case, nor did the Respondent raise the insufficiency of the instruction in its appeal from the District Court.

STATEMENT OF CASE

The Petitioner, Stanley E. Reed, brought a diversity action under 28 U.S.C. §1332 in the United States District Court for the Western District of Texas against the Respondent, Chevron Pipe Line Co., asserting, inter alia, a claim under Texas law for compelled self-publication defamation arising from the Petitioner's termination from employment with the Respondent. A trial was held before a jury, and at the close of the Petitioner's evidence the Respondent made a motion for judgment as a matter of law which was denied by the District Court. Respondent made a similar motion at the close of all the evidence, which was again denied by the District Court. Thereafter, the jury returned a verdict for the Petitioner on his claim for compelled self-publication defamation and

awarded him damages of approximately $1 million. Respondent again moved for judgment as a matter of law after the jury returned its verdict, which motion was again denied by the District Court. Respondent sought postjudgment relief on the basis that the evidence was insufficient to support the verdict, but the District Court denied such relief and judgment was entered on the jury's verdict.

Respondent appealed to the Court of Appeals for the Fifth Circuit asserting, inter alia, that the evidence was insufficient to sustain the jury's verdict, although the Respondent did not challenge the adequacy of the instructions given the jury. The Fifth Circuit panel, who looked only at the cold record and briefs, agreed, on April 8, 1996 reversed the judgment, rendered

judgment in favor of the Respondent, and reversed an award of attorney's fees to the Petitioner. In its decision, the Fifth Circuit panel stated that it was reviewing the verdict for sufficiency of evidence and noted that a mere scintilla of evidence is insufficient to present a jury question and that there must be a conflict in substantial evidence to create a jury question. After assuming that a cause of action for compelled self-publication defamation exists under Texas law, the panel held that a qualified privilege protected the Respondent in this case, requiring the Petitioner prove by clear and convincing evidence that the Respondent acted with actual malice. It stated that the Petitioner offered no direct evidence of the state of mind of any of the Respondent's employee's responsible for

the termination of the Petitioner, and so held that the Petitioner failed to carry his burden of proving actual malice by clear and convincing evidence.

Petitioner petitioned for rehearing on the ground that the circumstantial evidence in the case was sufficient to support the jury's determination that the Respondent had acted with actual malice. Petitioner argued that the credibility of the witnesses was solely for the jury (and the trial judge) and that they were entitled to disbelieve Respondent's witnesses and their testimony concerning their reasons for terminating the Petitioner. The Trial Judge obviously agreed with the jury. On May 14, 1996, the Fifth Circuit filed a per curiam order denying the Petitioner's petition for rehearing.

ARGUMENT

I. The 5th Circuit Court of Appeals violated the Seventh Amendment's reexamination clause by reversing the Trial Court's judgment on the basis that the evidence is insufficient to support the jury verdict underlying the judgment.

This Court has never held that a Court of Appeals may, consistent with the Seventh Amendment, review a judgment entered in a Trial Court on the basis that the evidence supporting a verdict determining liability on which the judgment was entered was insufficient to support the verdict and judgment. [1]

---

[1]The seventh amendment issue in this case is not controlled by this Court's decision last term in Gasperini v. Center for Humanities, Inc., 64 U.S.L.W. (BNA) 4607 (June 24, 1996). The holding in that case was only that a New York statute controlling compensation awards for excessiveness could be given effect in an action tried in federal court under diversity jurisdiction, without offending

Indeed, this Court's precedent is expressly to the contrary. In United States v. Laub, 12 Pet. (37 U.S.) 1, 5 (1838), this Court stated that it is "a point too well settled to be now drawn into question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial, and cannot be made a ground of objection on a writ of error." That this rule is grounded in the reexamination clause of the seventh

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the seventh amendment, if the review standard set forth in that law is applied by the federal trial court judge, with appellate control of the trial court's ruling limited to review for abuse of discretion. 64 U.S.L.W. (BNA) at 4608.

amendment is confirmed by the decision in Parsons v. Bedford, 3 Pet. (28 U.S.) 433, 447-49 (1830), where a claim of error in a district court's refusal to allow transcription of testimony was rejected largely on the basis of the seventh amendment:

> This is a prohibition to the Courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the Court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate Court, for some error of law which intervened in the proceedings.
>
> * * *
>
> [I]f the evidence were now before us, it would not be competent for this Court to reverse the judgment for any error in the verdict of the jury at the trial; the refusal to allow that evidence to be entered on the record is not matter of error, for which the judgment can be reversed.

See also Metropolitan Rail v. Moore, 121 U.S. 558, 573 (1887) (practice of reviewing trial court denial of a motion for a new trial based upon insufficiency of the evidence is perhaps forbidden in the appellate courts of the United States by the reexamination clause of the seventh amendment).

This application of the seventh amendment is not a 19th-century anachronism, but has been applied by this Court in more recent decisions. Thus, in Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481-82 (1932), this Court stated that the rule that this Court will not review the action of a federal trial court in denying a motion for a new trial for error of fact rests upon the reexamination clause of the seventh amendment and has been settled by a long and unbroken line of decisions.

It also noted that the rule "precludes likewise a review of such action by a Circuit Court of Appeals." Id. at 481 (footnote omitted). And in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 247 (1940), the Court held that the case fell "within the well established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact," citing the Fairmount Glass Works case. "Certainly," this Court went on to state, "denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review." United States v. Socony-Vacuum Oil Co., supra, 310 U.S. at 248.

Despite this clear precedent emanating from this Court, the Court of Appeals below engaged in precisely the kind of review prohibited by this precedent and the seventh amendment's reexamination clause. Despite the jury's finding that the Respondent was liable on the compelled self-defamation claim, the fact that the instructions upon which this verdict was rendered were not challenged, and the fact that the District Court repeatedly rejected the Respondent's motions for judgment and a new trial based upon the insufficiency of the evidence, the Court of Appeals reexamined the cold record before it and determined that the conclusions of the jury and the District Court were not correct. "Trial judges have the 'unique opportunity to consider the evidence in

the living courtroom context,' Taylor v. Washington Terminal Co., 409 F.2d 145, 148 (D.C. Cir. 1969), while appellate judges see only the 'cold paper record,' [Gasperini v. Center for Humanities, Inc.,] 66 F.3d [427], at 431 [(2d Cir. 1995)]." Gasperini v. Center for Humanities, Inc., supra, 64 U.S.L.W. (BNA) at 4613. The cases of this Court simply do not support the Court of Appeals' action in reversing a factual finding made by the jury and upheld upon motions for judgment and a new trial that the Respondent was liable to the Petitioner on his compelled self-defamation claim.

Such review cannot be approved on the basis that it does not constitute a reexamination of a "fact tried by a jury" within the meaning of the seventh

amendment. While it has been suggested that a federal court is reviewing a question of law in considering whether the trial court abused its discretion in denying a new trial, one commentator has stated that this argument is "purely verbal." C.A. Wright, "The Doubtful Ominiscience of Appellate Courts," 41 Minn. L. Rev. 751, 761 (1957). Thus,

> [i]f a jury finds defendant negligent, and the appellate court decides that the clear weight of the evidence shows him free from negligence, it is re-examining the jury's determination of a fact issue. Very few people are deceived into thinking the issue has been transmuted into an issue of law because the appellate court says it is finding only that the trial judge abused his discretion in not finding the clear weight of the evidence to be contrary to the verdict.

Id. at 761.

Nor can review of the kind engaged in in this case be upheld on the basis that it conforms with "the rules of common law" within the meaning of the seventh amendment. While it is true that English courts did grant new trials on the ground that a verdict was contrary to the evidence, "the common law system was one in which the verdict could be set aside only if the judge who had presided at the trial and heard the witnesses deemed the verdict to be unjustified, and even then, only if he could persuade his brothers at Westminster to this view." Id. at 763. Thus, the procedure at common law required that the trial judge in the first instance find the verdict unsupported by the evidence. Furthermore, the English court which could reverse a verdict was in substance the same court which tried the action

before a jury, and so cannot be deemed an appellate court reviewing a verdict for the sufficiency of supporting evidence. Gasperini v. Center for Humanities, Inc., supra, 64 U.S.L.W. (BNA) at 4619 (Scalia, J., dissenting).

Although review of verdicts by courts of appeal for sufficiency of evidence has become common in some federal circuits, this practice by no means translates into constitutionality. Indeed, some courts of appeal have questioned whether they may, consistent with the seventh amendment, review verdicts based on the sufficiency of evidence. See Dunlap-McCuller v. The Riese Organization, 980 F.2d 153, 157 (2d Cir. 1992), cert. denied, 114 S. Ct. 290 (1993) (appellate review of jury verdict and denial of motion for new trial based upon insufficiency of evidence is inconsistent with the seventh amendment);

Green v. American Airlines, Inc., 804 F.2d 453, 455 (8th Cir. 1986) (same). In any event, even "a longstanding, widespread practice is not immune from constitutional scrutiny." Payton v. New York, 445 U.S. 573, 600 (1980). This practice and the action of the Court of Appeals in this case violates the restriction on reexamination plainly set forth in the seventh amendment, and the judgment below should be reversed on this basis.

II. Assuming Review For Sufficiency Of The Evidence Is Constitutional, Did The Court Of Appeals Apply A Proper Standard In Determining The Sufficiency Of The Evidence In This Case?

Even if review of a verdict based upon sufficiency of the evidence is allowed by the seventh amendment, the Court of Appeals' judgment in this case should be reversed because it applied an

improper standard for determining the sufficiency of the evidence. As discussed above, this Court has never countenanced review of jury verdicts on liability based upon the sufficiency of the evidence, and so has not had the occasion to establish the applicable standard of review. The various courts of appeal which have embraced such review have used a variety of standards for determining whether a verdict is not supported by sufficient evidence. See, e.g., Dutton v. Wolpoff & Abrahamson, 5 F.3d 649, 653 (3d Cir. 1993) (verdict can be overturned if record fails to contain minimum quantum of evidence from which jury could have rationally reached a verdict); Calusinski v. Kruger, 24 F.3d 931, 936 (7th Cir. 1994) (a verdict will not be overturned if it has a reasonable basis in the record). In the instant

case, the Court of Appeals held that the standard under which "'a mere scintilla of evidence is insufficient to present a question for the jury,'" and "'there must be a conflict in substantial evidence to create a jury question'" (quoting Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969)).

It is submitted that this standard gives insufficient deference to the verdict of a jury and the decision of a district court not to disturb that verdict on a motion for judgment as a matter of law or a new trial, especially in light of the concerns raised by the seventh amendment. In Gasperini v. Center for Humanities, Inc., supra, this Court held that a New York statute requiring review of damage awards made by juries must be applied in federal courts trying actions under diversity jurisdiction, but held that such review

should not be made in the first instance by the court of appeals. This Court held that review by the district court in the first instance was required by the "characteristics of the federal-court system" concerning the proper role of trial and appellate courts. Specifically, "[w]ithin the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility" for application of the New York statute because trial judges have the unique opportunity to consider the evidence in the living courtroom context, while appellate judges see only the cold record. 64 U.S.L.W. (BNA) at 4613. Thus, this Court ordered that the district court must first determine whether the jury's damage award was improper as excessive, with the court of

appeals reviewing the district court's decision for "abuse of discretion." Id. at 4613-14.

Gasperini thus indicates that factual findings made by a jury and reviewed by the district court on postverdict motions should be reviewed under an "abuse of discretion" standard on appeal, given the characteristics of the federal court system as informed by the seventh amendment's reexamination clause. Such review is very narrow and has been defined as follows:

> "Abuse of discretion" is one of the most deferential standards of review; it recognizes that the district court, which is intimately familiar with the nuances of the case, is in a far better position to make certain decision than is an appellate court, which must work from a cold record.

In re Bolar Pharmaceutical Co., Securities Litigation, 966 F.2d 731, 732 (2d Cir. 1992). Abuse of discretion

occurs only where no reasonable person could take the view adopted by the trial judge, who must be accorded great deference in light of his or her first-hand exposure to the evidence and familiarity with the course of the trial. United States v. Hughes, 970 F.2d 227, 232-33 (7th Cir. 1992). In the context of reviewing administrative determinations, an abuse of discretion may be found only if there is no evidence to support the decision. Jaimez-Revolla v. Bell, 598 F.2d 243, 246 (D.C. 1979).

The review engaged in by the Court of Appeals in this case was certainly less deferent than that required under an abuse-of-discretion standard. The court below did not review on a "no evidence" standard, but held that a mere scintilla of evidence was not enough. In fact, the court's reference to the requirement that

there be a "conflict in substantial evidence" indicates that the court below required substantial evidence to support the verdict and the denial of the postverdict motions. Furthermore, the court never mentioned the deference which must be accorded to the trial court's decision not to grant a judgment as a matter of law or a new trial to the Respondent in light of the trial court's familiarity with the course of proceedings at trial. The Court of Appeals plainly applied a standard of review which was insufficiently deferent to the jury verdict and the District Court's decision not to overturn that verdict.

The error committed by the Court of Appeals in reviewing the sufficiency of the evidence certainly was harmful to the Petitioner because there was evidence supporting the jury's verdict and

supporting the view that the District Court's denial of the Respondent's post-trial motions was not an abuse of discretion. The Court of Appeals' decision rested largely on the ground that the Petitioner offered no "direct evidence on the state of mind" of any of the individuals involved in the decision to terminate the Petitioner, and so the Petitioner failed to prove that these individuals acted with actual malice, i.e., reckless disregard as to the truth or falsity of the allegations which formed the basis of the Petitioner's termination, in deciding to terminate the Petitioner. However, the Court of Appeals also recognized that the Petitioner presented evidence that his firing was a pretext for age discrimination and that the jury could have chosen to disbelieve the testimony

of the Respondent's witnesses that they believed the allegations of misconduct made against the Petitioner.

That the evidence presented to the jury was sufficient to allow it to find that there was actual malice in this case is supported by this Court's decision in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), a case involving a claim under the federal employment discrimination laws. The key issue in the case was whether the evidence was sufficient to prove that the employer had engaged in intentional discrimination on the basis of the employee's race. This Court held that so long as an employer satisfies its burden of producing evidence of a nondiscriminatory reason for the adverse action, any presumption of discrimination upon proof of a prima facie case of discrimination drops out of the picture, and then held as follows:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required[.]"

Id. at 2749 (emphasis in original; footnote omitted; citation omitted).

Hicks thus recognizes that a jury's decision to disbelieve a witness as to their state of mind or intent will suffice to permit it to infer the ultimate fact of intent. In this case, the jury could have disbelieved the Respondent's witnesses concerning their belief in the truth in the accusations against the Petitioner and their

disclaimer of any intent to terminate the Petitioner on the basis of his age. The jury was permitted to believe that the Respondent's witnesses were lying and that they, in fact, knew the allegations against the Petitioner were false or acted in reckless disregard as to their truth or falsity. The jury's disbelief of the Respondent's witnesses allowed the jury to infer intent, i.e., malice, and, contrary to the Court of Appeals' holding, no additional proof on this fact was required. Id.

This, combined with the other evidence of record, shows that the jury's verdict was supported by sufficient evidence and that the District Court did not abuse its discretion in upholding that verdict on postverdict motions by the Respondent. The searching review standard applied by the Court of Appeals

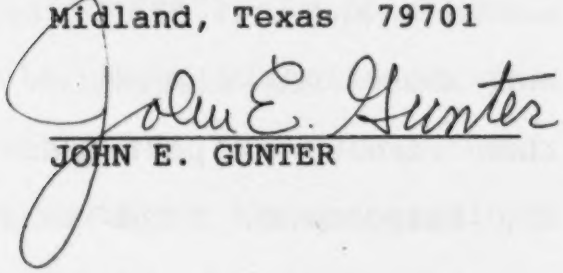
was simply inconsistent with the deference that is constitutionally required to be given jury verdicts and trial court decisions. Therefore, the Court of Appeals' judgment must be reversed.

CONCLUSION

For all of the foregoing reasons, the Petitioner, STANLEY E. REED, asks this Court to grant his Petition for Writ of Certiorari to the Fifth Circuit United States Court of Appeals.

Respectfully submitted,

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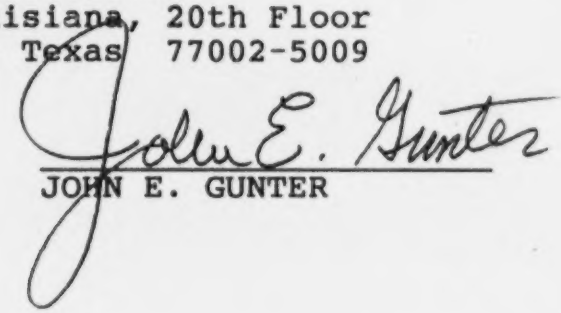


JOHN E. GUNTER

CERTIFICATE OF SERVICE

The undersigned certifies that two true and correct copies of the Petition for Writ of Certiorari and Appendix was mailed on the 6th day of August, 1996, to the following attorneys of record:

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October Term 1995

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CHEVRON PIPE LINE COMPANY,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

APPENDIX

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APPENDIX

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MAY 14, 1996 ORDER OF THE FIFTH CIRCUIT COURT OF APPEALS DENYING PETITIONER'S PETITION FOR REHEARING..... B-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-50409
Summary Calendar

STANLEY E. REED,

Plaintiff-Appellee,

VERSUS

CHEVRON PIPE LINE COMPANY,

Defendant-Appellant.

Appeal from the
United States District Court
for the Western District of Texas
(MO-94-CA-194)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Defendant Chevron Pipe Line Company ("CPL") appeals a judgment entered after a jury verdict, for plaintiff Stanley E. Reed on his claim of compelled self-publication defamation.[1] Concluding that the evidence is insufficient to support the verdict, we reverse and render judgment for the defendant.

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*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

1 Reed's complaint alleged several other claims, but judgment for Reed was entered only as to the claim of compelled self-publication defamation. Reed has not appealed the judgment regarding his other claims.

I.

Stanley Reed worked for CPL and its corporate predecessor, Gulf Oil Corporation, for twenty-one years until CPL terminated him. During his last year of employment, he worked as a supervisor at CPL's Odessa office. Most of Reed's time was spent in the office rather than in the field. Two clerical employees, Maria Salgado and Paula Roberts, also worked at the Odessa office. Their duties also required them to spend most of their time in the office.

In May of 1993, Salgado and Roberts contacted a supervisor in another office to report Reed for allegedly hostile, harassing, and intimidating behavior. Salgado also reported Reed's alleged behavior to Dub Brown, one of CPL's human resources representatives.

Brown investigated Salgado and Roberts's allegations, concluding that Reed had created a hostile work environment and had intimidated the two women in violation of CPL's corporate policies. Brown reported his conclusions to Gary Williams, Reed's direct supervisor in Houston. Based on Brown's investigation, Williams referred Reed to CPL's employee assistance program ("EAP").

As part of his participation in CPL's EAP, Reed was required to undergo counseling with a psychologist, Dr. Perry Marchioni. After this initial round of counseling, Marchioni determined that Reed was fit to return to work. He in fact returned to work on June 2, 1993.

Shortly thereafter, Salgado's supervisor in Odessa called Rob Kinnear, another member of CPL's management, to allege that Reed was retaliating against Salgado and Roberts. Kinnear called Reed

and ordered him to go home but did not terminate him at that time. Instead, he referred Reed back to the EAP for extensive counseling.

Marchioni referred Reed to a hospital to confirm that there was no physical cause for his alleged behavior. Marchioni began seeing Reed on a regular basis for counseling purposes and, after several visits, concluded that Reed suffered from several personality disorders. Marchioni also concluded that further attempts at therapy would be futile and recommended that Reed be placed in a position with limited or no supervisory duties.

Upon receiving Marchioni's report, CPL directed Brown and Jeanne Suminski-an in-house attorney for Chevron Corporation, CPL's parent company-to conduct further investigations. They

held further interviews, from which they concluded that Salgado and Roberts's complaints were valid.

CPL also called in outside consultants-psychologists specializing in workplace violence-to consider Reed's alleged behavior. These psychologists confirmed Brown and Suminski's determination that the complaints against Reed were valid and concluded, in addition, that Reed could become potentially violent when faced with a stressful situation, such as termination. They recommended that, if CPL decided to terminate Reed, it should hire security for both the location of the termination and the Odessa office for three days following termination.

Based upon the results of all of these investigations and examinations, Brown determined that the allegations

against Reed were true and in violation of CPL's corporate policies. He reported those conclusions to Kinnear, who-after conferring with Brown, Suminski, and others involved in the investigation of Reed-then decided to terminate Reed. After Reed refused CPL's offer to allow him to resign, Kinnear terminated him on November 11, 1993, on the ground that he had engaged in sexual harassment and improper conduct.

Reed introduced no evidence contravening these facts, although he did hotly dispute at trial the substantive results of the investigations and examinations-i.e., he did adduce evidence to support his arguments that he was not psychologically dysfunctional, that he had not engaged in sexual harassment and improper conduct, and that CPL had erred in concluding that Salgado's and Roberts's complaints were valid.

It is undisputed that no CPL employee ever communicated the reasons for Reed's termination to a third party, including any of Reed's prospective employers. Reed testified, however, that he felt compelled, in employment interviews, to disclose the stated reasons for his termination.

At trial, Reed introduced no evidence from which to infer that Kinnear, Williams, Brown or Suminski personally disbelieved either (1) that Reed had engaged in sexual harassment and other improper conduct or (2) that he had been fired for the reasons given to him. CPL introduced affirmative evidence that Brown (1) believed the allegations against Reed and (2) believed that Reed was terminated for the reasons CPL had advanced.

II.

The jury returned a verdict for Reed on the compelled self-publication defamation claim, and the district court entered judgment accordingly. CPL moved for judgment as a matter of law (1) at the close of the plaintiff's case; (2) at the close of all evidence; and (3) after the verdict. It also moved for post-judgment relief.

We review the verdict for sufficiency of the evidence. See Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). In so doing, we note that (1) "[a] mere scintilla of evidence is insufficient to present a question for the jury," and (2) "[t]here must be a conflict in substantial evidence to create a jury question." Id. at 374-75.

III.

Except for the differences in procedural posture and standard of review, this case is virtually indistinguishable from our decision last year in Duffy v. Leading Edge Prods., Inc., 44 F.3d 308 (5th Cir. 1995). In that case, the plaintiff sued under a theory of compelled self-publication defamation, alleging that his former employer was liable for damages "because it was reasonably foreseeable that he would as a practical matter be required to tell prospective employers of the allegedly defamatory reason for his termination." Id. at 311. As we did in Duffy, we assume arguendo, without deciding, that a publication had occurred in this case and that a cause of action for compelled self-publication defamation

exists under Texas law. See id. at 312 n.5.[2]

We held in Duffy that, under Texas law, "'[a] communication on a subject in which the author or the public has an

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[2]In Duffy, we noted that it was an open question-one over which the Texas appellate courts had split-as to whether Texas recognizes a cause of action for compelled self-publication defamation. See 44 F.3d at 312 n.5. The appellate case we cited for the proposition that Texas does not recognize such a cause of action is Doe v. SmithKline Beecham Corp., 855 S.W.2d 248, 259 (Tex. App.-Austin 1993), aff'd as modified on other grounds sub nom. SmithKline Beecham Clinical Lab. v. Doe, 903 S.W.2d 347, 350 (Tex. 1995). See Duffy, 44 F3d at 312 n.5. The Texas Supreme Court granted a writ of error in that case, but the court did not have an opportunity to decide the issue of whether Texas recognizes such a cause of action. See SmithKline Beecham Clinical Lab., 903 S.W.2d at 350 (noting that plaintiff had withdrawn her point of error complaining of summary judgment for defendant on defamation claim).

interest, or with respect to which the author has a duty to perform to another owing a corresponding duty, may constitute a qualified or conditional privilege.'" Id. at 312 (quoting Marathon Oil Co. v. Salazar, 682 S.W.2d 624, 630 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.)) The Duffy court also held that references and accusations made by an employer about an employee have a qualified privilege if the remarks are made to a person with an interest in, or a duty regarding, the matter to which the remarks relate. See id.; see also Schauer v. Memorial Care Sys., 856 S.W.2d 437, 449 (Tex. App.-Houston [1st Dist.] 1993, no writ); ContiCommodity Servs. v. Ragan, 63 F.3d 438, 442 (5th Cir. 1995) ("Accusations or comments about an employee by his employer, made to a person having an interest or duty in the matter to which

the communication relates, have a qualified privilege."), cert. denied, 1996 WL 26533 (U.S. Mar. 25 1996).

The qualified privilege protects communications to which it applies unless actual malice is shown. See id. Qualified privilege must be pled as an affirmative defense. See id. at 443. If that defense is validly asserted by the employer, Texas law places the burden of proving "actual malice" upon the plaintiff. See id.; Duffy, 44 F.3d at 314.

"Whether a communication has a qualified privilege is a question of law for the court." Schauer, 856 S.W.2d at 449. In this case, the district court concluded that the privilege applied. Reed has not challenged that conclusion.

Under Texas defamation law, "actual malice" does not mean "ill will, spite, or evil motive." See Ragan, 63 F.3d at

442; Duffy, 44 F.3d at 313. It is a term of art, borrowed from New York Times v. Sullivan, 376 U.S. 254 (1964), and its progeny. See Duffy, 44 F.3d at 313. In Duffy, we determined that the Texas Supreme Court would apply the following definition of actual malice in a compelled self-publication defamation case:

> "Actual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true. 'Reckless disregard' is defined as a high degree of awareness of probable falsity, for proof of which the plaintiff must present 'sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' An error in judgment is not enough." Carr v. Brasher, 776 S.W.2d 567, 571 (Tex. 1989) (citations omitted).

44 F.3d at 313.[3]

---

[3]In Hagler v. Proctor & Gamble Mfg. Co., 884 S.W.2d 771 (Tex. 1994) (per curiam), the court stated its legal standard for actual malice:

> This court has set forth the legal standard for proving actual malice in a defamation case, stating that actual malice is a term of art which is separate and distinct from traditional common law malice. Actual malice in the defamation context does not include ill will, spite or evil motive, but rather requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Actual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true.

Id. at 771-72 (citation omitted). Although we did not cite to this opinion in Duffy, our opinion in Duffy is consistent with the legal standard articulated in Hagler.

We interpreted this passage as stating that actual malice is "a higher standard than common law malice" and that "only clear and convincing proof will support recovery." Id. We also noted that the Texas Supreme Court had extended the New York Times test to cases of qualified privilege outside the First Amendment context. See id.[4]

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[4]The Supreme Court has expressly held that the states have broad-but not unlimited-discretion to define the scope of a publisher's liability for defamation of a private individual: "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

In any case, because we applied this actual malice standard in Duffy, we are bound to do so here as well.

IV.

When reviewing a jury verdict, we apply federal procedural law in determining whether there was sufficient evidence to support the verdict. See Boeing, 411 F.2d at 374. We look to state law, however, for "'the kind of evidence that must be produced to support a verdict.'" Ayres v. Sears, Roebuck & Co., 789 F.2d 1173, 1175 (5th Cir. 1986) (quoting McCandless v. Beech Aircraft Corp., 779 F.2d 220, 223 (5th Cir. 1985), vacated on other grounds on petition for panel reh'g, 798 F.2d 163 (5th Cir. 1986) (per curiam)). The critical question presented in this case, therefore, is whether Reed presented evidence sufficient to constitute clear and

convincing proof that CPL acted with actual malice. Cf. Duffy, 44 F.3d at 312-13.[5]

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[5]The Supreme Court has expressly approved this synthesis of federal and state legal standards in an analogous context:

> In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the New York Times "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a New York Times case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The actual malice analysis is a substantive standard that centers on the state of mind of the person or persons making the allegedly defamatory statements. See Seidenstein v. National Medical Enters., 769 F.2d 1100, 1104 (5th Cir. 1985). In this case, the relevant persons for that inquiry are the people who terminated Reed. At most, this would include Kinnear, Williams, Brown, and Suminski. Any allegedly defamatory statements made by them were entitled to a presumption of good faith and lack of malice. See Schauer, 856 S.W.2d at 449.

Reed offered no direct evidence on the state of mind of any of these individuals. Instead, he argued below that he was not psychologically dysfunctional, that he should have been accorded fictitious "due process" rights, that he was unfairly treated by CPL, and

that he was discriminated against on the basis of age. In other words, he misapprehended the legal theory of defamation and failed to present direct evidence on a critical element of a defamation claim brought under Texas law: actual malice.

The key question, in other words, is not whether Reed actually sexually harassed Salgado and Roberts (or engaged in improper conduct toward them), but rather whether Kinnear, Williams, Brown, or Suminski believed that he did. Even if Reed had been able to prove that the allegations of Salgado and Roberts were false, he still could not prevail. The actual malice analysis focuses on the declarant's subjective state of mind, not the objective truth of the declarations; thus, "[p]roof of falsity in fact is not enough, nor is proof of a combination of falsehood and general hostility."

Seidenstein, 769 F.,2d at 1104; see also Ragan, 63 F.3d at 443; Duffy, 44 F.3d at 314.

The most glaring example of Reed's failure to understand his legal theory occurred during the direct and cross-examinations of Brown. On direct, CPL's counsel asked Brown questions regarding his state of mind during and after his investigation of Reed:

> Q: And when you spoke to these Chevron employees [the ones Brown interviewed when investigating Reed], did you believe them.
>
> A. Yes. Yes.
>
> Q. Was there any doubt in your mind that they were telling the truth or telling falsehoods?
>
> A. No, not at that point in time.
>
> Q. Did you ever, at any time, think that they were not telling the truth?
>
> A. No.

On cross, Reed's counsel did nothing to challenge either this specific testimony or the broad proposition that Brown had believed that Reed had engaged in sexual harassment and improper conduct-the grounds CPL gave Reed as the basis for his termination.

In Seidenstein, the plaintiff called as a witness Dr. Egbert, the declarant of the allegedly defamatory statement. See 769 F.2d at 1104. On cross examination, the defendant corporation asked Egbert whether he believed the contents of his allegedly defamatory statement. See id. Egbert answered affirmatively. See id. The plaintiff did not challenge this assertion, "[d]espite the obvious importance to Seidenstein's case of establishing that Egbert did not in fact so believe." Id.

Even more astonishing is what occurred when the defense counsel tried to cross-examine one of the plaintiff's witnesses on the issue of Egbert's truthfulness: The plaintiff's counsel objected on the ground that he "'knew of nothing yet that would bring that into issue.'" Id. We corrected the impressions of the plaintiff's counsel in no uncertain terms:

> To the contrary, it is difficult to imagine anything more fundamentally at issue than Dr. Egbert's truthfulness in an action governed, as was this one, by the definitions of "actual malice"...; Dr. Seidenstein can scarcely have been expected to prove that Dr. Egbert spoke with knowledge that his statement was false or with reckless disregard for whether it was false or not without questioning Egbert's truthfulness.

While Reed correctly argues that the jury could have chosen to disbelieve Brown, it is well-established that "'discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.'" See id. at 1105 (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 512 (1984)). The Texas courts have specifically held that a jury's belief that a statement was in fact incorrect does not constitute affirmative evidence that the statement's declarant knew that it was false. See Casso v. Brand, 776 S.W.2d 551, 558-59 (Tex. 1989) (noting that it was unlikely, although not inconceivable, that such evidence could be uncovered for first time in cross-examination); Breen v. DeLord, 723 S.W.2d 166, 170 (Tex. App.-Austin 1986, no writ).

Reed argues on appeal that the jury could have inferred that the investigation and termination of Reed were based on reasons other than those given to Reed-i.e., ulterior motives.[6] Cf. Duffy, 44 F.3d at 315 n.10 (dictum) (stating only that evidence of ulterior motive could "bolster" an inference of actual malice, not support it independently). Reed argues, in particular, that the jury could have found that he was terminated because of his age and points to the fact that the jury found that his termination had constituted age discrimination.

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[6] The jury was not instructed on this ulterior motive theory.

The district court, however, granted judgment as a matter of law against him on the age discrimination claim after the jury had returned its verdict. The order of final judgment expressly stated that Reed's "proof" of age discrimination consisted entirely of a mild, conclusionary assertion that he thought age might have been a factor in his hiring. As the district court noted, this was nothing more than "mere refutation." It was certainly not the type of evidence that could clear the "clear and convincing" hurdle. In fact, the district court expressly found that it was not even sufficient to demonstrate, by a preponderance of the

evidence, that Reed was a victim of age discrimination committed by CPL.[7] Such evidence, even if believed, could not have met Reed's burden of showing actual malice by clear and convincing proof.

The burden of proving actual malice by clear and convincing evidence is a heavy one: "When the testimony concerning 'actual malice' has conflicted or could plausibly be interpreted either way, we have concluded that the Plaintiff has not met his burden." National Assn of Gov't Employees v. National Fed'n of Fed. Employees, 844 F.2d 216, 220 (5th

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[7] Because we hold that Reed failed to prove actual malice, we need not reach CPL's claims contesting some of the district court's evidentiary rulings.

Cir. 1988). The evidence that an alleged defamer entertained serious doubts as to the truth of his communication "cannot be found in a record that causes us to entertain [instead] serious doubts as to [the communication's purported] falsity." Seidenstein, 769 F.2d at 1105.

In this case, we are faced with precisely this situation. The evidence offered by Reed did not even approach clear and convincing proof of actual malice.

To the contrary, the record causes us seriously to doubt that CPL's stated grounds for termination were anything but true. The record certainly prevents us from seriously entertaining either the notion that Kinnear, Williams, Brown, or Suminski personally disbelieved that Reed had engaged in sexual harassment and improper conduct, or the notion that they had personally disbelieved that Reed was being fired for those reasons.

V.

The district court awarded attorney's fees to Reed of $20,000. CPL appeals the award, arguing that there was no legal basis for it. Reed concedes on appeal that he was not entitled to fees. He did not prevail on his claim under the Age Discrimination in Employment Act ("ADEA") and therefore could not collect fees under that statute.[8]

---

[8]The ADEA, 29 U.S.C. § 626(b) (1985), incorporated the attorney's fees provision of the Fair Labor Standards Act, 29 U.S.C. § 216(b) (Supp. 1995), which authorizes the recovery of attorneys fees only by a plaintiff who secures a judgment. See 29 U.S.C. § 626(b); cf. Falcon v. General Tel. Co., 815 F.2d 317, 322 (5th Cir. 1987) (stating that plaintiff in title VII case must demonstrate, as threshold requirement for obtaining attorney's fees, that he was prevailing party).

Furthermore, Texas law does not permit the recovery of attorney's fees for tort claims. See Stine v. Marathon Oil Co., 976 F.2d 254, 264 (5th Cir. 1992); TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 1986).

The award of attorney's fees must therefore be reversed, as there is no legal basis to support it.

Accordingly, we REVERSE the judgment against CPL on the defamation claim, RENDER judgment for CPL on that claim, and REVERSE the award of attorney's fees.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-50409

STANLEY E. REED

Plaintiff - Appellee

V.

CHEVRON PIPELINE COMPANY

Defendant - Appellant

Appeal from the United States
District Court for the
Western District of Texas

ON PETITION FOR REHEARING

(May 14, 1996)

Before KING, SMITH and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

151

United States Circuit Judge

Supreme Court, U.S.
FILED
SEP 6 1996
CLERK

No. 96-215

In The

Supreme Court of the United States

October Term, 1995

STANLEY E. REED,

Petitioner,

vs.

CHEVRON PIPE LINE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This appeal presents the following issues:

I. Should the Court grant a *writ of certiorari* to review established Supreme Court precedent holding that appellate courts may, consistent with the Seventh Amendment, reverse a trial court's denial of a motion for judgment as a matter of law and render a judgment contrary to the verdict?

II. Should the Court grant a *writ of certiorari* to review settled case law by this Court establishing that appellate courts review such orders as issues of law?

STATEMENT OF INTERESTED PARTIES

Defendant/Respondent

Chevron Pipe Line Company

Plaintiff/Petitioner

Stanley E. Reed

Other Interested Parties

Parent of Defendant/Respondent

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APPENDIX

Respondent's Appendix — Order on Final Judgment Filed May 18, 1995	1a

RULE INVOLVED

Petitioner adequately quotes the second clause of the Seventh Amendment, the only constitutional provision at issue here.

This case also involves Rule 50, FED.R.CIV.P., which provides, *inter alia*:

> **Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings**
>
> **(a) Judgment as a Matter of Law.**
>
> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. . . .
>
> **(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the

legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment — and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) . . . .

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT OF THE CASE

Stanley Reed was terminated by his former employer, Chevron Pipe Line Company ("CPL"), following an extensive investigation into allegations by several co-employees that he was harassing and intimidating female subordinates. CPL referred Reed to the Employee Assistance Program for evaluation and counseling but determined that upon returning to work, he engaged in retaliation and was not willing to cooperate with the counselor. CPL then terminated him. (Petitioner's Appendix ("Pet. App."), at A-4 - A-8.)

Reed sued alleging that CPL had denied him Sixth and Fourteenth Amendment due process in its investigation, had sexually harassed him, was guilty of sex discrimination, had violated the Age Discrimination in Employment Act ("ADEA") and caused him to defame himself.[1] The due process and sexual harassment claims were dismissed on summary judgment. A jury trial was held on the remaining claims.

At the close of Reed's evidence, CPL moved for judgment as a matter of law under Rule 50(a), FED.R.CIV.P., against all of Plaintiff's remaining claims, arguing that Reed had failed to offer legally sufficient evidence of sex discrimination, age discrimination, or actual malice. The motion was granted on the sex discrimination claim but denied on the ADEA and self-

---

1. Reed was told he was being terminated for sexual harassment; he claimed the real reason was his age. The theory of self-publication defamation is based on the concept that the former employer is liable for damages if it gives the employee a false and defamatory reason for his termination because it is reasonably foreseeable that he would be required to tell prospective employers the reason for his termination. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 311 (5th Cir. 1995). The Supreme Court of Texas has not resolved the split in the courts of appeal as to whether Texas recognizes this tort. (Pet. App., at A-12, n.2.)

defamation claims. At the close of all of the evidence, CPL renewed its motion for judgment as a matter of law. The district court ruled that, while the jury would be instructed that a qualified privilege applied to any communications by CPL to Reed or by Reed to prospective employers[2], the motion for judgment was denied. The jury found in favor of Reed on both claims; CPL renewed its motion under under Rule 50(b).

The district court granted CPL's motion on the ADEA violation holding that there was insufficient evidence as a matter of law to meet even the preponderance standard applicable to that claim. However, the district court denied the motion on the self-defamation claim and entered judgment in favor of Reed. (Respondent's Appendix ("Resp. App."), appended hereto.)

CPL appealed contending, *inter alia*, that there was insufficient evidence as a matter of law from which a reasonable jury could conclude that Plaintiff had clearly and convincingly proven that CPL acted with actual malice and the trial court erred in denying its motion for judgment as a matter of law. Reed filed no cross-appeal and did not request a new trial in the event his judgment was reversed. Instead, he argued only that the jury verdict must be upheld. The court of appeals, in an unpublished opinion, held that there was insufficient evidence as a matter of law, to support the self-defamation claim, reversed the judgment

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2. The Fifth Circuit has held that the *"New York Times v. Sullivan*, 376 U.S. 254 (1964) standard of actual malice would be applied to self-defamation claims in Texas, if it were to recognize such. *Carr v. Brasher*, 776 S.W. 2d 567, 571 (Tex. 1989). So long as the people who told Reed why he was being terminated neither knew the stated reasons were false nor entertained serious doubt as to their truth, the qualified privilege prevails. *See Schauer v. Memorial Care Systems*, 856 S.W. 2d 437, 449 (Tex. App.—Houston [1st Dist.] 1993, no writ). Plaintiff's burden of proof on these issues is "clear and convincing." *Duffy*, 44 F.3d at 313, citing to *Howell v. Hecht*, 821 S.W. 2d 627, 630 (Tex. App.—Dallas 1991, writ denied).

in favor of Plaintiff and rendered judgment in favor of CPL.[3] Reed moved for reconsideration but even then did not request a new trial under Rule 50(d).

Reed now petitions this Court for a *writ of certiorari*, claiming that the actions of the court of appeals violated the Seventh Amendment and that the court erred in failing to apply an abuse of discretion standard in reviewing the denial of the motion for judgment as a matter of law.

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3. The Fifth Circuit noted that: "The actual malice analysis is a subjective standard that centers on the state of mind of the person or persons making the allegedly defamatory statements. . . . [T]he relevant persons for that inquiry are the people who terminated Reed. . . . Any allegedly defamatory statements made by them were entitled to a presumption of good faith and lack of malice . . . Reed offered no direct evidence on the state of mind of any of these individuals. Instead, he argued below that he was not psychologically dysfunctional, that he should have been accorded fictitious "due process" rights, that he was unfairly treated by CPL and that he was discriminated against on the basis of age. In other words, *he misapprehended the legal theory of defamation and failed to present direct evidence on a critical element of a defamation claim brought under Texas law: actual malice.*" (Pet. App., at A-20-21) (citations omitted) (emphasis added). As to Reed's argument that the missing element might have been supplied if the jury disbelieved the testimony of the relevant CPL employees that they believed that the stated grounds for his termination were true, the Fifth Circuit stated: "[I]t is well-established that 'discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.' " *Id.* at A-25. Similarly, the Fifth Circuit disposed of Reed's speculation that the jury could have concluded that the ulterior motive for his termination was age discrimination, noting that the jury was not instructed on this theory, *id.* at A-26, n. 6, and that the trial court had ruled that there was not even sufficient evidence under the preponderance standard to support such, a ruling Reed did not challenge on appeal. *Id.* at A-26.

REASONS FOR DENYING THE WRIT

I.

THRRE IS NO REASON TO GRANT A *WRIT OF CERTIORARI* TO REVIEW ESTABLISHED SUPREME COURT PRECEDENT HOLDING THAT APPELLATE COURTS MAY, CONSISTENT WITH THE SEVENTH AMENDMENT, REVERSE A TRIAL COURT'S DENIAL OF A MOTION FOR JUDGMENT AS A MATTER OF LAW AND RENDER A JUDGMENT CONTRARY TO THE VERDICT.

The essence of Petitioner's argument is that: "[t]his court has never held that a Court of Appeals may, consistent with the Seventh Amendment, review a judgment entered in a Trial Court on the basis that the evidence . . . was insufficient to support the verdict and judgment." (Petition for Writ of Cert., at 5.) Apparently petitioner is not aware of *Neely v. Martin K. EBY Construction Co.*, 386 U.S. 317 (1967), which twenty-nine years ago held just that and also held that if a trial court erred in denying a motion for judgment as a matter of law, the appellate court could also direct entry of a judgment contrary to the verdict.

The procedural backgrounds in *Neely* and this case are very similar. In *Neely*, plaintiff sought damages for wrongful death. At the close of plaintiff's evidence and again at the close of all the evidence, defendant moved for a directed verdict. The trial judge denied both motions and submitted the case to the jury, which returned a verdict for plaintiff. Defendant then moved for judgment *n.o.v.* or, in the alternative, for a new trial in accordance with Rule 50(b). The trial court denied the motion and entered judgment for plaintiff on the jury's verdict. Defendant appealed the denial of its motion for judgment n.o.v.

The Seventh Circuit held that the evidence at trial was legally insufficient to establish either negligence or proximate causation and reversed the judgment with instructions to the district court to dismiss the action. Plaintiff sought a *writ of certiorari*, questioning the power of the court of appeals, consistent with the 1963 amendments to Rule 50 and the Seventh Amendment, to direct the trial court to dismiss the action. *Id.* at 319-20.

The Court in *Neely* upheld precisely what was done here by the Fifth Circuit:

> Under Rule 50(b), if a party moves for a directed verdict at the close of the evidence and if the trial judge elects to send the case to the jury, the judge is "deemed" to have reserved decision on the motion. If the jury returns a contrary verdict, the party may within 10 days move to have judgment entered in accordance with his motion for directed verdict. This procedure is consistent with decisions of this Court rendered prior to the adoption of the Federal Rules in 1938. Compare Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 55 S. Ct. 890, 79 L. Ed 1636, with Slocum v. New York Life Ins. Co., 228 U.S. 364, 33 S. Ct. 523, 57 L. Ed. 879, and Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 57 S. Ct. 809, 81 L. Ed. 1177. And it is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147.
>
> The question here is whether the Court of

> Appeals, after reversing the denial of a defendant's Rule 50(b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.* See Baltimore & Carolina Line, Inc. v. Redman, supra. Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n.o.v.* on appeal. Section 2106 of Title 28 provides that,
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> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C.A. § 2106.
>
> See Bryan v. United States, 338 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335.

Id. at 321-22.

The balance of the discussion in *Neely* involved the question of alternative requests under Rule 50(d) for new trial in lieu of entry of an adverse judgment as a matter of law. Since plaintiff in *Neely* did not ask either the trial court or the court of appeal for a new trial in lieu of an adverse judgment, the Supreme Court held that it would not review that issue. *Neely*, 386 U.S. at 330. Reed is in the same shoes, as he never requested a new trial or suggested any grounds therefor in lieu of an adverse judgment.

On at least two occasions, the Supreme Court has reversed courts of appeals' affirmance of judgments and itself remanded the causes to the district court with instructions to enter judgment n.o.v. upon finding no legally sufficient evidence to support the judgment. *See Chinoweth v. Lessee of Haskell*, 28 U.S. (3 Pet.) 92 (1830); and *New York, N.H. & H.R. Co. v. Henagan*, 364 U.S. 441 (1960).

Neely relied on *Baltimore & Carolina v. Redman*, 295 U.S. 654 (1935), in which the Court held that at common law it was recognized that, where the issue of the legal insufficiency of the evidence had been properly reserved, judgment could be entered contrary to the jury verdict:

> At common law there was a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be essential by the ruling under the reservation, such as nonsuiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the

> jury had given a verdict to the other or making other essential adjustments.

Redman, 295 U.S. at 658-59.

The Court observed that whatever may have been the origin or theoretical basis of this practice, it undoubtedly was well established when the Seventh Amendment was adopted and, "therefore, must be regarded as a part of the common law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that amendment." *Redman*, 295 U.S. at 660. The Court in *Redman* held that, where the case has been submitted to the jury subject to a reservation of the issue of the legal insufficiency of the evidence, then a judgment can be entered contrary to the jury verdict, consistent with the Seventh Amendment. *Id.* at 660-61.

The Federal Rules of Civil Procedure adopted two years after *Redman*, included Rule 50 which, with minor procedural modifications, adopted the common law procedure recognized in *Redman*.[4] *See* 5A JAMES W. MOORE *et al.*, MOORE'S FEDERAL PRACTICE ¶ 50.07[1] p. 72 (2d ed. 1996). Rule 50(b) added a mechanism to replace the express reservation in *Redman* and to avoid problems discussed there when the trial court did not expressly reserve its decision. *See* Advisory Committee Notes, 1937 Adoption, Notes to Subdivisions (a) and (b).

None of the cases cited by Reed arose from a properly preserved motion for judgment as a matter of law. Instead, either they were decided well before *Redman* or they dealt with motions for new trial, which have an entirely different theoretical basis both in the trial courts and on appeal. His citations are, therefore, irrelevant.

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4. The constitutionality of Rule 50 is well settled. 5A MOORE'S FEDERAL PRACTICE ¶ 50.07 [1], p. 73 (citing to *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940); *Berry v. United States*, 312 U.S. 450 (1941)); and 9A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d §2522.

It has clearly been recognized by this Court for over 60 years that the appellate courts, upon finding error in the denial of a motion for judgment as a matter of law, can reverse and order that judgment be entered contrary to the verdict of the jury. There is no reason to grant *certiorari* to revisit this well settled area of law.

II.

THERE IS NO REASON TO GRANT A *WRIT OF CERTIORARI* TO REVIEW SETTLED CASE LAW BY THIS COURT ESTABLISHING THAT APPELLATE COURTS REVIEW SUCH ORDERS AS ISSUES OF LAW.

A. Petitioner Failed To Preserve This Issue

Reed asserts for the first time in his petition for *writ of certiorari* that an abuse of discretion standard applies when an appellate court reviews a trial court's denial of a motion for judgment as a matter of law under Rule 50. The Court should decline to hear this issue never presented to the court of appeal.

B. Issues of Law Are Reviewed *De Novo*

It is not the trial court's exercise of discretion which is at issue when the appellate courts review the denial of a motion for judgment as a matter of law. Rather, the issue is one of law — was sufficient evidence presented such that a reasonable jury could find for that party on that issue. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); and Rule 50(a)(1). Because the appellate courts are reviewing issues of law, deference to the trial court is not given. *See* cases cited at n. 5, *infra*. Reed confuses motions for new trial with motions for judgment as a matter of law.

In *New York, N.H. & H.R. Co. v. Henagan*, 364 U.S. 441 (1960), this Court reviewed the affirmance by the First Circuit of the denial of a motion for judgment n.o.v. Upon finding no legally sufficient evidence to support the verdict, the Court itself reversed and remanded to the district court with instructions that judgment n.o.v. be entered for defendant. *Id.* at 442. In doing so, the Court reviewed the decision by the trial and appellate courts on the same standard as did the trial court — was there a legally sufficient evidentiary basis for a reasonable jury to find facts necessary to support the verdict? *See also Chinoweth v. Lessee of Haskell*, 28 U.S. (3 Pet.) 92 (1830); and *Redman*, 295 U.S. at 695. No deference was given to the trial court (or to the court of appeal for that matter) on this issue of law.

It is uniformly held among the circuits that a trial court's ruling on a motion for judgment as a matter of law is reviewed *de novo*, as an issue of law.[5] In footnote 5 to the Fifth Circuit's opinion in *Reed*, the standard employed by this Court for determining the sufficiency of evidence of actual malice in a *New York Times* case is quoted from *Anderson*, 477 U.S. at 255. That standard is:

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5. *See Sullivan v. National Football League*, 34 F.3d 1096, 1091 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1252 (1995); *E.E.O.C. v. Ethan Allen, Inc.*, 44 F.3d 116, 119 (2nd Cir. 1994); *McDaniels v. Flick*, 59 F.3d 446, 453 (3rd Cir. 1995); *City Nat. Bank v. American Commonwealth Finan. Corp.*, 801 F.2d 714, 717 (4th Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987); *London v. MAC Corp. of America*, 44 F.3d 316, 318 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 99 (1995); *Snyder v. Ag Trucking, Inc.*, 57 F.3d 484 (6th Cir. 1995); *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 343 (7th Cir. 1995); *Commercial Property Invs., Inc. v. Quality Inns Int'l, Inc.*, 61 F.3d 639, 644 (8th Cir. 1995); *Large v. Penn Mut. Life Ins. Co.*, 843 F.2d 1175, 1181 (9th Cir. 1988); *Connett v. Justus Enterprises of Kansas, Inc.*, 68 F.3d 382, 384 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1018 (1996); *Beckwith v. City of Daytona Beach Shores, Fla.*, 58 F.3d 1554, 1561 (11th Cir. 1995); *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 975 (Fed.Cir. 1995), *aff'd*, 116 S. Ct. 1384 (1996); *Calloway v. Central Charge Serv.*, 440 F.2d 287, 289 (D.C. Cir. 1971).

> In sum, we conclude that the determination of *whether a given factual dispute requires submission to a jury* must be guided by the substantive evidentiary standards that apply to the case. *This is true at both the directed verdict and summary judgment stages.* Consequently, where the New York Times "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not. (emphasis added).

In *Anderson*, this Court held that the judge must ask whether a fair minded jury could return a verdict for the plaintiff on the evidence presented. *Id.* at 254-55. That standard is embodied in Rule 50(a)(1).[6]

The Fifth Circuit correctly identified the only issue

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6. " . . . If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party. . . . " Rule 50(a)(1).

presented on appeal here: ". . . whether Reed presented evidence sufficient to constitute clear and convincing proof that CPL acted with actual malice." (Pet. App., at A-19.) Finding that, "[t]he evidence offered by Reed *did not even approach* clear and convincing proof of actual malice," (Pet. App., at A-29) the Fifth Circuit reversed and rendered.[7] (emphasis added).

C. The Cases Cited by Reed Are of No Help to Him

Reed's reliance on *Gasperini v. Center for Humanities, Inc.*, __ U.S.__, 116 S. Ct. 2211 (1996), in arguing for an abuse of discretion standard is misplaced. The Court in *Gasperini*, a diversity action, dealt with issues of federalism in reviewing the disposition of a motion under a New York statute for new trial due to excessive damage.*Gasparini* had nothing to do with the standard of review of a trial court's denial of a motion for judgment as a matter of law. *Gasperini* is irrelevant.

Reed's attempt to rely on *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), is similarly misplaced.[8] That Title VII discriminationcase does not support the notion that legally

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7. Moreover, the Court observed that "To the contrary, the record causes us seriously to doubt that CPL's stated grounds for termination were anything but true. The record certainly prevents us from seriously entertaining either the notion that Kinnear, Williams, Brown, or Suminski personally disbelieved that Reed had engaged in sexual harassment and improper conduct, or the notion that they had personally disbelieved that Reed was being fired for those reasons." (Pet. App., at A-29).

8. There are a number of distinctions between *St. Mary's* and this case: (1) *St. Mary's* is a Title VII discrimination claim, this is a common law defamation claim; (2) plaintiff in *St. Mary's* established a *prima facie* discrimination claim, Reed did not (Resp. App., at 2a); and (3) the burden of proof in *St. Mary's* was by a preponderance of the evidence, but in a *New York Times* defamation case such as this, plaintiff must prove malice with clear and convincing evidence.

sufficient evidence was presented in *Reed* to support the jury's finding of actual malice. To the contrary, *St. Mary's* is consistent with the result here.

In *St. Mary's*, the Court held that where a Title VII plaintiff has established a *prima facie* case, the burden of going forward shifts to defendant to present evidence of a non-discriminatory reason for termination. Upon presenting such, the presumption vanishes. The burden of proof remains, however, at all times on plaintiff. *Id.* at 506-507. The Court reversed the Eighth Circuit's ruling that upon the trial court's finding that it disbelieved defendant's explanation of a non-discriminatory basis for termination, together with the facts which gave rise to the *prima facie* case, judgment *must* be entered for plaintiff. *Id.* at 505. While holding in the language quoted by Reed that the evidence which created the *prima facie* case, together with disbelief of defendant's proffered non-discriminatory explanation *may* be sufficient to support a judgment for plaintiff, the Court emphasized that the trier must still conclude that plaintiff has proven that he was discriminated against: "it is not enough [for the fact finder] in other words, to disbelieve the employer; the fact finder must believe Plaintiff's explanation of intentional discrimination." *Id.* at 519.

This Court certainly did not hold in St. Mary's that a failed *prima facie* case, together with speculation that the jury may have disbelieved the employer's explanation, would satisfy even a preponderance of the evidence burden, much less the burden to prove actual malice with clear and convincing evidence.[9] As held by the Fifth Circuit in *Reed*, a vacuum left by the trier's

9. The District Court found "as a matter of law . . . the Plaintiff has not proven that Chevron Pipe Line violated the Age Discrimination in Employment Act nor has the Plaintiff proven that he was a victim of age discrimination on the part of Chevron Pipe Line." (Resp. App., at 1a-6a) Plaintiff never challenged this ruling by the District Court.

disbelief of defendant's explanation is not sufficient. (Pet. App., at A-25 and A-28-29.) Plaintiff must still prove the affirmative; Reed did not.

This Court has repeatedly recognized that Rule 50 motions raise issues of law and are reviewed on that basis. They are not within the discretion of the trial court and are not reviewed for abuse of discretion. No issue exists worthy of a *writ of certiorari.*

CONCLUSION

Reed's petition presents no grounds for issuance of a *writ of certiorari.* The law in this area has long been settled, there are no conflicts among the circuits and no reason has been advanced by Reed for reconsidering any of these areas. Therefore, the petition for *writ of certiorari* should be denied.

Respectfully submitted:

September 6, 1996

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RESPONDENT'S APPENDIX — ORDER ON FINAL JUDGMENT FILED MAY 18, 1995

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS MIDLAND-ODESSA DIVISION

STANLEY E. REED	)	
	)	
v.	)	**MO-94-CA-184**
	)	
CHEVRON PIPE LINE COMPANY	)	

ORDER ON FINAL JUDGMENT

BEFORE THE COURT, in the above-captioned cause of action, is Plaintiff's proposed Final Judgment and Defendant's Motion For Judgment As A Matter Of Law And Order For Conditional New Trial; And, Alternative Motion For New Trial. The Court is of the opinion that the Judgment, as submitted by Plaintiff, should be denied. The Court is further of the opinion that Defendant's Motion For Judgment As A Matter Of Law should be granted in part and denied in part. Defendant's other motions before this court, however, should be denied.

As to Jury Question Number One, the Court must determine, as a matter of law, if there was sufficient evidence brought forth in trial to support a finding of Age Discrimination, in violation of the Age Discrimination in Employment Act. In order to determine whether age discrimination was present in a case where there is no direct evidence of such discrimination, as in the instant case, the Plaintiff must establish a prima facie case of age discrimination. *See Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815

(5th Cir. 1993). In order to determine this, we must walk through a four step analysis. *Id.*

We must determine if the Plaintiff was: (1) Discharged; (2) qualified for the position; (3) within the protected age class — over 40 — at the time of discharge; and (4) replaced by someone outside of the protected age class — under 40 — or was otherwise discharged because of his age. *Id.* There seems to be no dispute over whether Reed meets the first three criteria. He does. As to the fourth criteria, concerning the first part, there was undisputed evidence at trial that the Plaintiff was replaced by another white male over the age of 40. Thus far all four of the criteria have been met. The question arises however, in the second part of number four. Was the Plaintiff otherwise discharged because of his age? The only evidence brought forth at trial was Reed's own assertion that he thought that age might have been a factor.[1] This assertion, with nothing else, is insufficient to make a prima facie case of age discrimination.

However, assuming Reed does establish his prima facie case, he establishes a rebuttable presumption that the employer unlawfully discriminated against him. *Id.* Chevron Pipe Line may then negate this presumption by articulating a legitimate, non-discriminatory reason for its action. *Id.* If the Defendant articulates a non-discriminatory reason for firing the Plaintiff, and produces sufficient evidence to support this reason, "the burden reverts to the [P]laintiff to prove that the employer's

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1. There was testimony from two other Chevron Pipe Line employees who also thought age may have been a factor in their being fired. These two employees however were fired one year after Reed's termination, and as part of a company wide layoff, and therefore their testimony on this issue is irrelevant.

reasons are pretextual."[2] In the instant case, the Defendant made a showing through the testimony of several witnesses that Reed was terminated from his employment for nondiscriminatory reasons; i.e. sexual harassment and violation of company policy and procedures. Therefore, the burden shifts back to the Plaintiff to show these stated reasons were pretextual.

"The [P]laintiff can show pretext by introducing evidence which proves that the reason[s] stated by the employer, 'though facially adequate, [were] untrue as a matter of fact, or [were], although true, a mere cover or pretext' for illegal discrimination."[3] As stated previously, the Plaintiff's only evidence of age discrimination was his mild assertion that he thought age might have been a factor. This does not meet the burden to show that Chevron Pipe Line's stated reasons for termination were pretext. Plaintiff's proof must consist of more than "a mere refutation of the employer's legitimate nondiscriminatory reason."[4] Here, the Plaintiff's only evidence is a 'mere refutation'; thus no pretext has been shown.

The Court therefore finds, as a matter of law, that the Plaintiff has not proven that Chevron Pipe Line violated the Age

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2. *Moore* citing *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 646 (5th Cir. 1985), which cited *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-55, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981).

3. *Moore* citing *Normand v. Research Inst. of Am., Inc.*, 927 F.2d 857, 859 (5th Cir. 1991) (quoting *Elliott v. Group Medical & Surgical Servs.*, 714 F.2d 556, 566 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215, 104 S.Ct. 2658, 81 L.Ed.2d 364 (1984)).

4. Id. (citing *Hanchey b. Energas Co.*, 925 F.2d 96, 97 (5th Cir. 1990)).

Discrimination in Employment Act nor has the Plaintiff proven that he was a victim of age discrimination on the part of Chevron Pipe Line. This cause of action will therefore be disallowed. The amount of damages was not separated into two distinct money questions, by agreement of the parties, and is therefore indistinguishable as to the two claims and will consequently not be disturbed. Accordingly,

IT IS ORDERED that Plaintiff's proposed Final Judgment, as submitted, shall be DENIED.

IT IS FURTHER ORDERED Defendant's Motion For Judgment As A Matter Of Law shall be **GRANTED** as to the issue of Age Discrimination, as set forth above, and **DENIED** as to the remaining issues; and Defendant's Motion For Order For Conditional New Trial, And Alternative Motion For New Trial shall also be **DENIED**.

IT IS FURTHER ORDERED the remaining jury questions for the Judgment were:

QUESTION NUMBER TWO DO YOU FIND THAT THE DEFENDANT, CHEVRON PIPE LINE, ACTED WITH ACTUAL MALICE AND/OR IN RECKLESS DISREGARD IN ITS STATED REASONS FOR TERMINATION OF THE PLAINTIFF, STANLEY REED?

PLEASE ANSWER "YES " OR "NO" YES

QUESTION NUMBER THREE DO YOU FIND THAT THE DEFENDANT, CHEVRON PIPE LINE, MADE A

DEFAMATORY STATEMENT EITHER ORALLY OR IN WRITING, ABOUT THE PLAINTIFF, STANLEY REED?

PLEASE ANSWER "YES" OR "NO" YES

QUESTION NUMBER FOUR DO YOU FIND THAT THE DEFENDANT, CHEVRON PIPE LINE, COMMUNICATED OR PUBLISHED THE DEFAMATORY STATEMENT TO A THIRD PARTY?

PLEASE ANSWER "YES" OR "NO" YES

QUESTION NUMBER FIVE WHAT SUM OF MONEY, IF PAID NOW IN CASH, WOULD REASONABLY AND ADEQUATELY COMPENSATE STANLEY REED FOR THE DAMAGES HE SUSTAINED AS A RESULT OF THE DEFENDANTS' CONDUCT?

ANSWER IN DOLLARS AND CENTS, FOR DAMAGES, IF ANY, OR ANSWER "NONE."

ANSWER: $761,975.00

QUESTION NUMBER SIX WHAT SUM OF MONEY, AS AN AWARD OF PUNITIVE DAMAGES, WOULD BE REASONABLY APPROPRIATE TO SERVE AS A DETERRENT TO CHEVRON PIPE LINE FOR THEIR ACTIONS?

ANSWER IN DOLLARS AND CENTS, FOR DAMAGES, IF ANY, OR ANSWER "NONE."

ANSWER: $213.025.00

The total amount of the Judgment is $975,000.00.

IT IS FURTHER ORDERED that pre-judgment interest will not be added to the Judgment. Post-judgment interest will be allowed at the rate authorized by 28 U.S.C. § 1961. This will be calculated as of the date of this Judgment. Further, Costs will be assessed against the Defendant.

IT IS FINALLY ORDERED that counsel for Plaintiff submit an Affidavit listing his time and expenses the Court should consider for making a determination of Attorney's Fees. Counsel for Plaintiff shall submit this Affidavit within ten (10) days of the date of this Order.

SIGNED this 18th day of May, 1995.

s/ Lucius D. Bunton III
HONORABLE LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE